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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

MANUEL ANTONIO VELA et al.,

Defendants and Appellants.

F074383

(Super. Ct. Nos. BF162332A &
BF162332B)

OPINION

APPEALS from judgments of the Superior Court of Kern County. Gary T. Friedman, Judge.

Gideon Margolis, under appointment by the Court of Appeal, for Defendant and Appellant Manuel Antonio Vela.

William I. Parks, under appointment by the Court of Appeal, for Defendant and Appellant Gloria Ramirez.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Louis M. Vasquez, Rachelle A. Newcomb and William K. Kim, Deputy Attorneys General, for Plaintiff and Respondent.

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INTRODUCTION

What began as a verbal altercation between two couples ended in a violent street fight. One of the couples, Sammy E. and Jeannette H., suffered serious injuries. The other couple, codefendants Manuel Antonio Vela and Gloria Ramirez, was arrested and charged in a 10-count information with two counts of attempted murder (Pen. Code, §§ 664/187, subd. (a)),¹ four counts of assault with a deadly weapon (§ 245, subd. (a)(1)), two counts of mayhem (§ 203) and two counts of aggravated mayhem (§ 205).²

During trial, the court granted the prosecutor's motion to dismiss the following five counts against Ramirez for insufficient evidence: the attempted murders of Sammy and Jeannette (counts 1 & 2), assault with a deadly weapon against Sammy (count 3), mayhem against Sammy (count 7), and aggravated mayhem against Sammy (count 9). As to the remaining counts, the jury convicted Vela of the attempted murder of Sammy (count 1), assault with a deadly weapon against Sammy (count 3), assault with a deadly weapon against Jeannette (count 4), mayhem against Sammy (count 7), mayhem against Jeannette (count 8), aggravated mayhem against Sammy (count 9), and aggravated mayhem against Jeannette (count 10). The jury acquitted Vela of the attempted murder of Jeannette (count 2) and assault with a deadly weapon against Luis (count 5). The jury convicted Ramirez of assault with a deadly weapon against Jeannette (count 6) and two counts of simple assault against Jeannette (§ 240) (counts 8 & 10). The jury acquitted Ramirez of assault with a deadly weapon against Jeannette (count 4). As to Vela, the jury found true the sentence enhancements for personal infliction of great bodily injury (GBI) (§ 12022.7) attached to counts 1, 3, and 4, and for personal use of a deadly weapon (§ 12022, subd. (b)(1)) attached to counts 1 and 7 through 10. As to Ramirez, the jury

¹ All further statutory references are to the Penal Code.

² Vela was charged with assault with a deadly weapon against victim Luis G. in count 5 and Ramirez was charged with assault with a deadly weapon against Jeannette in count 6. The remaining eight counts were brought against both defendants.

found true the sentence enhancement for personal infliction of GBI attached to count 6. The jury found not true the special allegation that the attempted murder of Sammy was premeditated and found not true the gang enhancement allegations (§ 186.22, subd. (b)(1)), which were alleged as to all counts.

The trial court sentenced Vela on counts 9 and 10 (aggravated mayhem) to two consecutive terms of life with the possibility of parole, with each term enhanced by an additional one year for personal use of a deadly weapon.³ The court imposed but stayed sentences on counts 1, 3, 4, 7 and 8 pursuant to section 654. Ramirez was sentenced to the lower term of two years on count 6 (assault with a deadly weapon), enhanced by an additional three years for personal infliction of GBI. The court imposed but stayed sentences on counts 8 and 10 pursuant to section 654.

On appeal, Vela challenges his convictions for aggravated mayhem against Sammy and Jeannette as unsupported by substantial evidence. He also claims simple mayhem is a lesser included offense of aggravated mayhem and, therefore, his simple mayhem convictions must be reversed. The People dispute that Vela is entitled to relief from his aggravated mayhem convictions but concede his convictions for simple mayhem must be reversed.

Ramirez claims her statement to law enforcement was obtained in violation of *Miranda v. Arizona* (1969) 384 U.S. 436 (*Miranda*) and the trial court erred in concluding otherwise. She also claims the trial court misunderstood the scope of its discretion to stay or strike the GBI enhancement under section 1385 and her trial counsel rendered ineffective assistance of counsel in failing to call the court's sentencing error to its attention. The People respond that any error under *Miranda* in admitting Ramirez's statement was harmless beyond a reasonable doubt (*Chapman v. California* (1967) 386

³ After the jury returned its verdict, the court granted the prosecutor's motion to dismiss the allegations that Vela served four prior prison terms. (§ 667.5, subd. (b).)

U.S. 18 (*Chapman*)), but they concede that the trial court misunderstood the scope of its discretion to stay or strike the GBI enhancement, necessitating remand for a new sentencing hearing. Additionally, pursuant to Government Code section 68081, we requested Ramirez and the People brief whether Ramirez is entitled to reversal of one of her two simple assault convictions given that both offenses are based on the same act against the same victim. The People concede that under this circumstance, Ramirez may not be convicted of both offenses.

We reject Vela's sufficiency of the evidence challenge to his aggravated mayhem convictions and, even assuming error, we find the admission of Ramirez's statement to law enforcement harmless. However, we accept the People's concessions as to Vela's simple mayhem convictions, Ramirez's simple assault convictions and the trial court's sentencing error as well founded. Therefore, we reverse Vela's convictions on counts 7 and 8 for simple mayhem, we reverse Ramirez's conviction on count 8 for simple assault and we remand this matter to the trial court, so it may exercise its discretion to strike or stay Ramirez's GBI enhancement. The judgment is otherwise affirmed.

FACTUAL SUMMARY

I. Prosecution Case

A. Eyewitness Testimony

1. Sammy⁴

At the time of the crime, Sammy and his girlfriend, Jeannette, shared two young daughters and he considered her older children his stepchildren. He sometimes stayed at Jeannette's house on Townsley Avenue in Bakersfield, but he did not live there. At around 5:00 p.m. on November 22, 2015, Sammy was standing outside the house watching two of Jeannette's preteen sons and their friends play football in the street. He noticed a small, unfamiliar sport utility vehicle (SUV) stopped down the street and he

⁴ The jury was informed Sammy had a prior conviction for receiving stolen property.

asked Jeannette to see who it was. He testified he saw a woman and a man get out of the SUV and they appeared to be arguing. The couple then got back in the SUV and sped down the street toward Jeannette's house. The children playing football in the street hopped out of the way to avoid being hit and the SUV stopped in front of Jeannette's house.

The man, identified in court as Vela, got out of the SUV from the passenger seat and asked if anyone had a laser.⁵ Sammy, who denied at trial that he had been shining a laser, or that he or Jeannette owned a laser, told Vela no one had a laser and asked him what he was talking about. Sammy also told Vela their SUV almost hit his children and to watch where they were going.

Sammy testified Vela responded, "[F]uck you and your kids." Sammy gave Vela a strange look and Vela asked where he was from. Sammy said, "I don't bang," but "[I'm] gonna beat [your] ass." Vela stated he was "from the East Side."⁶ Sammy and Vela approached one another. Vela had his fists clenched so Sammy clenched his, too, but he did not throw a punch. Sammy testified he felt threatened, but he did not want to fight in front of the kids. He turned away and Vela punched him in the mouth. Sammy then removed the shirt he was wearing and the two squared off to fight. Sammy testified he clocked Vela several times while jumping around and avoiding Vela's swings. Sammy testified Vela then said, "[O]kay, I got you, fool," retrieved a knife from his

⁵ Jurors heard evidence that the victims' and the defendants' two families were acquainted with one another to some extent by virtue of seeing one another at school, at the bus stop, and around the neighborhood where Ramirez and Jeannette both lived. Jurors also heard evidence that there was some level of ill will related to bullying and stealing among the children. Sammy and Jeannette both testified that Ramirez and Vela had come to their house one time prior to the crime and accused their children of stealing a skateboard from Ramirez's children. Vela denied being present for any such confrontation and said he was in custody during that period of time, but he acknowledged hearing that Jeannette's children had stolen toys from Ramirez's yard.

⁶ Sammy testified he was not and had never been in a gang, but he knew Vela was once he said "East Side." Vela also had a gang tattoo on his face. Given that the jury rejected the gang enhancement allegations, however, we do not further address the gang evidence in this case.

vehicle and returned, slashing at Sammy with it.⁷ Sammy backed up to avoid being cut, and Jeannette appeared and tried to stop the fight.

Sammy left and went inside Jeannette's house. He then went inside the garage, where he retrieved a wrench and held it behind his back. He denied he went inside to get a knife or a gun, and he denied he owned a gun. He also denied he ever told Jeannette to grab some knives.

As Sammy returned with the wrench behind his back, he saw Jeannette had a metal pole in her hand and she was hitting the ground with it. Vela ran up to Jeannette with the knife and pushed her. She then hit Vela in the stomach once with the pole. Sammy testified that when he returned with the wrench, the female driver, identified as Ramirez, thought he had a gun behind his back because she yelled, "[H]e has a nine, he has a nine." Sammy testified he threatened to shoot, but he only had a wrench.

Vela backed up after getting hit by Jeannette with the pole and Ramirez got out of the SUV. Ramirez told Sammy she was not going to do anything, and he told her this was not her fight; it was between him and Vela. Ramirez approached Jeannette and they had a conversation, but Sammy did not see them begin to argue because, at that point, Ramirez's teenage son, Noel, also got out of the SUV. Sammy took the wrench out from behind his back and squared off with Noel, who got scared and ran to the other side of the SUV. Sammy turned and saw Vela and Ramirez jumping Jeannette. He testified Jeannette no longer had the pole and was curled up in a ball with her jacket over her head. Vela and Ramirez were stomping her with their feet. Sammy did not remember if he dropped or threw the wrench, but he got rid of it at that point and did not pick it up again during the confrontation.

⁷ Sammy testified it looked like a kitchen knife. On cross-examination, he denied telling an investigator he did not see the knife and, in later testimony, he clarified he was only able to see the tip of it.

Sammy went up to Ramirez, grabbed her by the hair and threw her off Jeannette. Sammy then hovered over Jeannette to protect her. Vela approached Sammy from behind and sliced his back open with a blade. It felt like a punch and Sammy did not initially realize he had been sliced. Vela then sliced Sammy's stomach open and cut his side.

Sammy testified he and Vela began exchanging blows again. Sammy grabbed Vela's hand with the knife in it, dropped to his knees and held on. Vela then slashed Sammy's neck open with a second weapon. After Vela sliced Sammy, Jeannette's neighbor, Luis, came over, and he and Vela also exchanged blows. Luis was not armed with a weapon and, after Vela started slashing with his knife, Luis ran around the SUV to get away. Luis's fiancée, T., said she was calling the police, at which time Vela and Ramirez returned to their SUV and drove off.

After Vela and Ramirez left, Sammy saw Jeannette's head was "busted open" and there was a lot of blood. He did not see who inflicted the injury, though. Luis told Sammy he was bleeding a lot and when Sammy returned to his porch, he saw his stomach cut open. He testified he gave a statement to police after they arrived, but he started seeing black dots and felt himself "lifting from [his] body." The paramedics' voices were echoing and then everything went blank. Sammy subsequently underwent surgery and was hospitalized for approximately three days. He testified he experienced severe pain, and had difficulty turning his neck and moving. He also testified that, at the age of 22, he was still not the same as he was before the attack.

Sammy testified he did not see any injuries to Vela or Ramirez and he did not see anyone hit Ramirez. He also testified he did not pick the wrench up again after he discarded it, and he never swung at anyone or hit anyone with it. He denied he or Jeannette ever hit Ramirez's SUV with their weapons. When shown photos of steak knives on the ground, Sammy denied they were his, and after initially identifying the

wrench and pipe in photographs, Sammy denied the photos were of the wrench and pipe he and Jeannette had that night.

2. Jeannette

After Ramirez stopped her vehicle in front of the house and Sammy said to slow down because they almost hit the kids, Vela accused them of having a laser. Jeannette heard something to the effect of, “F you and your kids.” Sammy and Vela exchanged words and Vela said he was from the East Side. Sammy said something like, “I don’t bang, but [I’ll] still beat your ass.”

Jeannette recalled having a heated conversation with Ramirez, but testified she did not get physical with anyone in the SUV. She also recalled banging a thin black stick or pole on the ground to scare Vela and Ramirez away prior to being injured, and she recalled hitting Vela in the stomach once when he approached her. She testified that neither she nor Sammy hit Ramirez’s SUV with the pole.

Jeannette also recalled hearing Ramirez say, “[T]hrow the bike at the bitch” Jeannette testified someone pulled her hood over her head; she did not know who, but only Ramirez and Ramirez’s son were nearby. She was then hit in the head while she was on the ground in a fetal position covering her head with her hands. She also heard someone say to stop and, at some point, someone helped her back to her house, where her wounds were wrapped. Jeannette testified she was unable to see anything until later that day at the hospital.

More than 100 stitches were required to close Jeannette’s wounds, and she had surgery on her right hand. She was unable to open that hand or bend it, and she was unable to use her right hand or arm for approximately four or five months. At the time of trial, which was approximately eight months after the crime, she was unable to make a full fist with her right hand and, at times, the injury affected her ability to complete everyday tasks.

On cross-examination, Jeannette denied the steak knives on the ground in the yard were hers and she denied telling Sammy to get a knife. She recalled Sammy saying “something about a nine,” but testified he did not threaten to shoot anyone and he does not have a gun. She also testified she did not see Sammy with a weapon.

3. Neighbors Luis and T.

a. Luis

Luis and his fiancée, T., lived across the street from Jeannette. They were just returning home from the fairgrounds with their children and Luis’s sister when they saw the altercation between Sammy and Vela. Luis testified that as he pulled his car into the driveway, he saw a vehicle parked in the middle of the street and Sammy and Vela arguing.⁸ They both looked angry and were cursing. Luis heard Vela say, “East Side,” and the two men began exchanging blows, but Luis did not see any weapons. Vela then pulled a silver folding knife from his pants pocket, chased Sammy, and sliced Sammy down his ear, along his neck, twice in the back, and once along his gut. Luis testified the slash wounds were deep and were inflicted while Sammy was on the ground and without a weapon.

Luis testified that the events unfolded very quickly. He was unsure of the precise timing of everything, but he saw Ramirez and Jeannette wrestling prior to when Vela drew a knife. After Vela pulled the knife, Luis saw Ramirez put Jeannette in a headlock, which Luis freed her from. Ramirez then obtained a wrench from the ground and struck Jeannette once hard between the eyes. Luis testified that Jeannette was not attacking Ramirez when she was struck with the wrench and after striking Jeannette, Ramirez returned to her SUV.

Luis then saw Vela slashing Sammy. Jeannette ran over to help Sammy and Vela turned the knife on her. Luis testified he saw Jeannette, who was unarmed and down on

⁸ Luis did not know Vela.

the ground, trying to hit Vela. Jeannette was covering her face with her arm, and Vela sliced her on the hand and inside of her arm. Luis described Sammy and Jeannette as both squirming on the ground trying to avoid Vela's knife.

Luis testified that when Vela pulled a knife, he knew Sammy needed help and he tried to help by pushing Vela off, but Vela turned on him and he ran. Vela then got back in Ramirez's SUV and they left.⁹ Luis subsequently heard Jeannette say, "[M]y eyes, my eyes, I can't see anything."

Luis testified he did not see Sammy or Jeannette with any weapons that night, he did not see anyone banging on Ramirez's SUV, he only saw Vela with one knife, and he did not see injuries on Vela or Ramirez. He also did not see Sammy enter the house, did not hear Sammy tell Jeannette to get a knife or threaten to shoot anyone, and did not hear anyone say Sammy had a gun. Luis denied telling law enforcement that he did not see Ramirez with a wrench; that he did not see Vela come at him with a knife; that it was his sister, not he, who saw the knife; or that T. saw most of the fight and had a better observation of it than he did. Luis also testified that Jeannette did not have anything covering her head.

b. T.

T. testified that when they returned home from the fairgrounds, she saw a lot of commotion in the street and heard yelling. Luis got out of their car first and, after telling the children to stay in the car, T. got out, locked the car and walked to the end of her driveway. She saw Jeannette's oldest daughter standing around crying and Jennette curled up in a ball with Ramirez on her knees in front of Jeannette and Vela over Jeannette. T. testified she could not see if Ramirez's fists were landing on Jeannette, but Ramirez was moving like she was hitting Jeannette and Jeannette was screaming. It also looked like Vela was hitting Jeannette repeatedly.

⁹ Luis called 911 after Vela and Ramirez left.

T. saw Sammy's and Jeannette's boys moving around, but she did not see Sammy. Luis ran up and pushed Ramirez off Jeannette, which sent Ramirez into the street near T. T. testified she put her hands up to signal she was not going to fight Ramirez. T. did not know if Ramirez had the metal tool before Luis pushed her, but T. heard the sound of metal on pavement and saw Ramirez grab what looked like a socket wrench from the ground. Ramirez then ran over and hit Jeannette in the face with the metal tool like she was hitting a baseball. Jeannette did not have a weapon and her hands were clenched over her face. After striking Jeannette, Ramirez grabbed her little boy, who was standing there crying, and got back in her SUV.

Luis then pushed Vela again and Vela let go of Jeannette's body; T. could see Jeannette drop. Vela chased Luis and then returned to the SUV, after which Ramirez peeled out and left. While Vela was chasing Luis, T. saw Sammy standing near his porch, bloody. She testified she could see his wounds from across the street, which she described as "open chunks of pink," and she thought, "[H]ow are you standing?"

Jeannette was completely covered in blood and there was so much blood on her face that T. could not see it. She had wide slices to her forearms. T. took Jeannette's oldest daughter to her own home and went inside to tell her babysitter and Luis's mother that they needed help. T., Luis and Luis's mother then tended to Sammy's and Jeannette's wounds with towels and sheets.

T. did not see any injuries on Vela or Ramirez and she testified Ramirez "looked like a fierce, crazed animal." She did not see any blood on Ramirez, but Vela had "a good amount [of blood] on ... his arms," which had been around Jeannette when she was bleeding. T. did not see a knife or anyone hitting Ramirez's SUV.

4. Jeannette's Children

a. De.

Jeannette's sons, De. and Di., were outside playing football in the street with other children when Ramirez drove down the street fast and stopped short of them. De., who

was 12 years old at the time of the crime, testified that Sammy told the occupants not to go too fast. Vela got out, yelled about pointing lasers and said something about “East Side Bakers.” He then hit Sammy in the face. Sammy got mad and the two began trading punches.

De. testified that Ramirez got out of the SUV and tried to jump in and hit Sammy. Jeannette said something about letting the fight be fair. Ramirez subsequently tackled Jeannette from behind and pulled her hood over her face so she could not see. Vela then ran over and stabbed Jeannette, who was on the ground. De. said he saw blood everywhere and he saw Sammy trying to help Jeannette off the ground. De. testified Luis came over and tried to help. He saw Luis try to push Vela and Vela chase Luis.

De. stated he did not see the end of the fight because he went inside the house. After the fight was over, he saw Sammy’s back and stomach were cut open. He did not see any injuries on Vela or Ramirez.

De. testified he did not see a knife. He subsequently testified he remembered telling the police he saw Vela with a knife but, at trial, he could not remember seeing Vela with a knife. He testified Vela was trying to stab Sammy, however. He also testified Sammy retrieved a wrench from the garage and had it behind his back to scare Vela and Ramirez, and he did not hit anyone with it, although he tried to hit Vela with it. De. did not see Jeannette or Luis with a weapon.

On cross-examination, De. testified the knives that were found in the grass belonged to Jeannette. He testified he did not know if Sammy hit anyone with the wrench and he did not hear Sammy threaten to shoot anyone.

b. Di.

De.’s younger brother, Di., testified that after the SUV stopped and Vela got out, Sammy stated the SUV almost hit the children. Vela accused them of using a laser and asked Sammy if he was from a gang. Sammy responded “no” and they began arguing. Both men threw up their fists and then Sammy started walking away. Vela hit Sammy,

after which Sammy took off his shirt and the two started the first of their two fights, using their fists.

After Sammy and Vela stopped fighting, Di. saw Sammy raise his hands when Noel got out of the SUV, but Sammy did not engage in a fight with Noel.

Di. testified Sammy brought out a wrench from the garage and held it behind his back to scare Vela and Ramirez away. Ramirez thought it was a gun and Sammy played along, but Di. did not hear him threaten to shoot anyone. Di. saw the tip of what looked like a knife in Vela's hand, and he saw Vela swinging his knife but did not see him cut anyone with it.

Di. saw Jeannette on the ground curled up with her jacket over her head, but he did not see how she got there. Vela and Ramirez were by Jeannette and were hitting her. Sammy went over, got Vela and Ramirez off Jeannette, and covered her with his arms. Di. also saw Luis come over and then run, and he heard T. say she was going to call the police. Vela and Ramirez then left.

After the fight ended, Di. saw that Jeannette's head was injured and he saw Sammy's injuries but did not see how they occurred.

Di. did not see Sammy hit Ramirez's SUV with a wrench or Jeannette hit it with a pole, and the vehicle was not hit by him, his brothers or his friends. He also did not see Jeannette with a pole. On cross-examination, Di. identified the steak knives on the ground as belonging to Jeannette. He testified that Sammy had the knives outside where he was repairing their bicycles and he used them to cut the inner tubes.

B. Ramirez's Statement to Law Enforcement

Ramirez was arrested two days after the incident and an audio of her statement to police, which was video recorded, was played for the jury. Ramirez told officers that the altercation occurred as she, Vela and her children were on their way home from the park and their dog jumped out of the car window. She said she had previously confronted Sammy and Jeannette about their children stealing toys from her backyard, and told

officers, “[W]e already don’t like each other, so they know who we are.” After her family’s dog jumped out of the window and they followed it, a verbal confrontation between the parties occurred and it escalated into a physical fight after Sammy hit Vela in the face.

At some point, Sammy said he had a gun and Jeannette appeared with a crowbar as the men were fighting. Ramirez warned Jeannette against hitting Vela with the crowbar, but then backed off because she was scared of the crowbar.

Jeannette then started hitting Vela with the crowbar. Ramirez said she told the kids to get the dog and get in the SUV. Vela also got in the SUV, but Ramirez said, “[T]hey wouldn’t let us leave.” She stated that Sammy and Jeannette both hit Vela multiple times, and it felt like it went on forever. She also said that Jeannette hit Vela in the head with the crowbar, which Ramirez described as the length of the interview table, multiple times for 20 to 30 minutes.

Ramirez stated Jeannette would not let her get back in the SUV and Vela, who was by then back in the car, got out again. Ramirez said that Sammy went to the garage, returned with a wrench and would not stop hitting Vela with it, and that “they,” including a neighbor in a Pendleton shirt, were beating Vela nonstop. Ramirez said Jeannette’s children had weapons, too, and were hitting Vela.

Ramirez said she got the crowbar away from Jeannette, threw it on the ground and “started socking [Jeannette] [¶] ... [¶] ... in [the] face.” Sammy came over and started hitting Ramirez in the back with the wrench. She told officers her back and the back of her head hurt, but she had not looked at them in the mirror. Noel then got out of the SUV, took the wrench away from Sammy, threw it and started helping Ramirez. Ramirez said that after Vela helped Noel out, they were finally able to leave.

Ramirez said her neighbor asked her what happened and said he heard she had stabbed some other neighbors, which she denied. Ramirez told the officers no one was

stabbed, she denied she or Vela had any weapons, and she said it was the others who had the weapons. She also said the only blood she saw was on Vela.

Photographs taken of Ramirez the day of her arrest depict a bruise on her right tricep, a bruise on the left side of her back, and some red marks on her back. Jurors also saw an out of focus photograph that the parties stipulated was of Ramirez's leg; the photo appears to show a mark.

C. Law Enforcement Testimony

When officers arrived, Sammy and Jeannette were covered in blood and appeared to be severely injured. Officers spoke with them briefly at the scene but did not take full, complete statements at that time.

Sammy had a laceration from mid-ear to his collar bone on the left side and his earlobe was split in two. He also had deep lacerations on his back and a deep laceration from his ribcage around to his stomach. Officer Ferguson, who took Sammy's statement, described him as cooperative but lethargic, in and out of lucidity, and having difficulty breathing given his injuries.

Jeannette had a laceration, or slicing injury, near her left elbow, an injury to her right arm, and an injury to her forehead above her eyebrows. She was actively bleeding and Officer Peck, who took her statement, described her as distraught over her injuries and in pain.

At the scene, police located three steak knives in the yard and a wrench. They did not locate a laser or a crowbar.

The evening of the crime, Vela went to the hospital. Photographs taken of him show a cut on his head above his left eyebrow. He stated at the time that he was playing basketball and knocked heads with someone else.

II. Defense Case—Ramirez

A. Ramirez's Children

Ramirez and Vela had been romantically involved in the past and had a six-year-old daughter, but they were no longer together. At the time of the crime, Ramirez had a restraining order against Vela, but he called that day and wanted to see his daughter, so Ramirez, their daughter and her four older children met at the park for the afternoon. On their way home from the park, someone pointed a red laser inside the SUV Ramirez was driving. The beam hit Ramirez and moved around the SUV. She stopped her SUV in the street and their dog jumped out through an open window.

1. Angelica

Ramirez's 14-year-old daughter, Angelica, testified that Ramirez drove down Jeannette's street, where the laser beam was coming from, to get their dog back. Sammy was standing in the front yard by himself and there was no one else outside. Ramirez parked her SUV in the street, got out and confronted Sammy about the laser. Sammy yelled at Ramirez, so Vela got out of the SUV and told him not to talk to her that way. Sammy and Vela started yelling and cussing at each other. Angelica testified Sammy said, "[T]his is westside," and he was a "Crip." Vela said, "Eastside Bakers." Sammy punched Vela, who hit him back.

Jeannette and her children then came out of the house and, at some point, Angelica heard Sammy tell the kids to go get a gun. When she came out, Jeannette had a metal stick in her hand that looked like a crowbar and she started hitting Vela with it, although Angelica did not remember where she hit him or how many times. Sammy broke away from the fight, went into his garage and returned with a large wrench. Ramirez, who did not have a weapon, got out of the SUV to stop Jeannette from hitting Vela, and Sammy grabbed her arm hard and hit her a couple of times on her back with the wrench, knocking her down. Angelica's brother, Noel, then got out of the SUV to pull Sammy

away from Ramirez. Sammy threw the wrench at Noel, but it missed and landed in the street.

After Sammy pushed Ramirez to the ground, Vela returned to the SUV and put his wallet, phone and Chapstick on the front seat. At that time, he was not injured. Angelica testified that Sammy and Jeannette were double-teaming Ramirez. Sammy hit Vela in the head with the wrench first and Vela subsequently slashed Sammy in the back. Angelica did not see a knife or anything in Vela's hands, but she saw his hand movements, blood and the injury to Sammy's back.¹⁰ While Sammy and Vela were fighting, Jeannette and Ramirez were fighting separately in the street.

At the end of the fight, Sammy was on Ramirez and Vela was on Sammy. A neighbor intervened and pulled Sammy off Ramirez and away from Vela, which allowed Ramirez and Vela to leave. After dropping their dog off at home, Ramirez dropped Vela off somewhere.

Angelica did not remember anyone hitting Jeannette with a wrench or weapon and she did not see Ramirez with the wrench that day, but she said Ramirez hit Jeannette with her fists when they were engaged in a fight. Angelica testified she did not see Jeannette curled up on the ground or with injuries, although she saw Jeannette holding her head. She also did not see Vela chase the neighbor. She acknowledged telling an investigator that she was trying to watch the fight and get their dog in the SUV at the same time, and that she saw most of the fight from the backseat of the SUV.

Angelica testified that when she later told Ramirez about the cuts on Sammy's back, Ramirez was unaware of them and was surprised.

Photographs of Ramirez's SUV showing dents in it were taken by Ramirez's mother several days after the fight. Angelica testified that the SUV did not have any

¹⁰ Angelica also subsequently testified that Sammy hit Vela in the head with the wrench before throwing it at Noel. She testified without equivocation that after Sammy threw the wrench at Noel, no one picked it up again.

dents in it before the fight, but she did not remember anyone hitting the SUV during the fight and she did not notice any dents in it until the day her grandmother took the photos.

2. Noel

Ramirez's son, Noel, who had just turned 15 years old when the crime occurred, testified that after Ramirez stopped her SUV because of the laser beam, the dog jumped out of the window. Ramirez said something to Sammy about the laser and he responded angrily. Vela got out and started fighting with Sammy. Noel testified he saw Sammy throwing gang signs and calling Vela names, and that he was sure Sammy said "Westside," but he was also "pretty sure" Sammy said, "Westside Crips." Vela told Sammy to calm down, Sammy punched him and the two started fighting.

After a few minutes, Jeannette came over with a large metal bar and started hitting Vela with it. When Jeannette began hitting Vela, Ramirez, who had been in the SUV telling Vela to get back in, got out and tried to pull Vela out of the fight. Jeannette hit Ramirez in the back with the bar and the two began fighting. Noel also testified that some of Jeannette's children were involved in the fight and, on cross-examination, Noel testified they had weapons as well and when Jeannette was fighting with Ramirez, the children hit Vela.

Sammy went back to the house, returned with a large wrench and hit Ramirez in the back of the head, the ribs and the back while she was down on the ground. He also hit her with his fists. At that point, Vela was fighting with two tall, white or light-skinned men who came from across the street. On cross-examination, Noel testified that, at times, the two men and Sammy were fighting with Vela and had him on the ground, and the two men were hitting Ramirez as she was fighting Jeannette. Noel did not see Vela do anything to Sammy or get a weapon from the SUV.

Noel got out of the SUV when Sammy and Jeannette were hitting Ramirez. Noel testified he pulled Sammy off Ramirez and Sammy threw the wrench at him but missed. Noel tossed the wrench aside and he and Sammy began hitting each other. Vela then ran

over, pulled Sammy off Noel and began fighting with Sammy. Ramirez and Jeannette were also still fighting. Ramirez finally said it was too much and they should go. The three of them then headed back to the SUV. Vela was bleeding from the head. The two men who were fighting with Vela ran up and tried to get at them inside the SUV, but Ramirez was able to drive off. After dropping their dog off at home, Ramirez dropped Vela off near a hospital.

Noel testified he never saw Ramirez with a weapon in her hand or Vela with a knife, and he did not see anyone hit Jeannette with a weapon. He also did not see Jeannette lying on the ground and did not see any injuries on her or on Sammy. He testified he saw Vela pull Jeannette off Ramirez but did not see Vela strike Jeannette.

Noel testified that prior to the fight, Ramirez's SUV did not have any damage to it. When Noel looked at it less than a week later, it had dents in it.

3. Ruben

Ramirez's son, Ruben, was 10 years old when the crime happened and at the time of trial. He testified that after someone shined a laser in Ramirez's eyes and Vela's face, Vela got out of the SUV first. Vela was talking to Sammy, who was yelling he did not point a laser. Ruben did not have a detailed memory of the fight but said that Vela then fought with Sammy and Ramirez helped Vela when he was being hit in the head with a crowbar by Jeannette. Ruben testified Ramirez did not have a weapon and she helped by pulling Jeannette off Vela. Ruben did not see Vela with a weapon, but he was "pretty sure" Vela went back to the SUV, got something and returned to the fight. Ruben testified Sammy had a wrench and he hit Ramirez with it in the ribs and back. He did not remember if anyone said anything about a gun, and he did not remember what Jeannette was doing when Sammy was hitting Ramirez.

Ruben got out of the SUV to help his brothers catch their dog and, after they put the dog back in the SUV, he stayed outside and tried to stop the fight. Ruben testified he yelled something, but then got back inside because no one was listening, and his younger

sister was crying. He testified Ramirez got back in the SUV first. Vela followed and his head was bleeding a lot.

Ruben also testified that when he was inside the SUV, an African-American man other than Sammy took the crowbar from Jeannette and hit the side of the SUV with it.

B. Other Evidence

1. Law Enforcement Testimony

a. Officer Aquino

Ramirez called three officers with the Bakersfield Police Department to testify. Officer Aquino responded to the scene of the fight and interviewed Jeannette's sons, De. and Di., separately. Aquino testified that De. did not tell him anything about the knives in the front yard and did not mention Sammy using them to work on bicycles. De. said his father got in a fight with Vela and his parents were stabbed, but he did not say anything about them having weapons.

Di. told Aquino that Vela was swerving as he drove down the street and the fight started after Sammy yelled at Vela for the way he was driving. Vela challenged Sammy to a fight and yelled, "Eastside." Sammy said he did not "gang bang."

Di. stated that the fight involved a knife and a wrench, and that his father was stabbed. Di. did not say Sammy had a wrench during the fight or threaten to shoot anyone and, although he said his mother was also involved, he did not say Jeannette had her hood pulled over her head, did not say she had a weapon, did not say any of the knives belonged to her, and did not say anything about a metal pipe or crowbar. Di. stated Vela retrieved a knife from the SUV after Sammy fell to the ground and Ramirez hit Jeannette with a wrench. He did not say anything about Sammy running into the house or Jeannette hitting Vela with a metal pipe or bar. Di. also did not mention a neighbor being involved or Vela chasing a neighbor with a knife.

b. Officer Ferguson

Officer Ferguson testified that when he interviewed Sammy, Sammy did not mention he threatened anyone with a gun or led anyone to believe he had a gun, and he did not mention anyone saying he had a gun. He also did not mention that he or Jeannette had any weapons, that Jeannette told him to get the knives, or that Jeannette hit Vela with a metal bar or pole. Sammy told Ferguson that he and Jeannette had both been stabbed and that Vela pulled a knife from his pocket.

c. Officer Galdamez

Officer Galdamez interviewed Luis, who described Vela and Ramirez as the suspects and pointed out Sammy and Jeannette, who were then receiving medical treatment at the scene, as the victims. Luis did not say anything about being involved in the fight. He mentioned Ramirez had Jeannette in a headlock, but he did not say he freed Jeannette from it. He also mentioned a “[s]ilver blade knife” was involved.

2. Character Witness

Ramirez also called Maria C. to testify. Maria, through her church’s women’s ministry, volunteered as a counselor mentoring single mothers. Maria had known Ramirez for approximately three years and more closely for the 11 months that preceded the crime. She testified Ramirez was a caring, truthful, nonviolent person, and she had never seen Ramirez display a temper. She also testified she was surprised to learn Ramirez was with Vela that day, because they had a rocky relationship, they were no longer together, and Ramirez was not interested in rekindling the relationship.

III. Defense Case—Vela

A. Rosa and Ededina

1. Rosa

Vela called Rosa and her mother, Ededina, to testify. They lived near Jeannette and were on their way to the mall when they saw the fight. Rosa called 911 and told the dispatcher that people were hitting each other and destroying a car. She stated that the

person who fled was African-American, and that the one man causing the problems and hitting the other car was in front of a house, which, by the address given, was Jeannette's house.

At trial, Rosa did not recognize Vela or Ramirez. She testified that an African-American male, whom she identified as Sammy from a photograph and described as "out of control," was violently hitting a white SUV with a wrench, including the windows, and she noticed crying children around the car.¹¹ She said there were white-complexioned women and one African-American woman around the car, and some neighbors were outside watching. Rosa said the white-complexioned people were trying to protect their children and get into the SUV but were not able to because Sammy was hitting the vehicle. Rosa heard cussing and said the African-American woman was injured, holding her head, and crying, but Rosa did not see an injury to her head. Rosa testified Sammy stopped hitting the car and dragged the woman forcefully into the house by her injured arm. The woman was saying, "Please don't, not anymore. Not anymore." The SUV then took off and Rosa saw Sammy outside making a telephone call.

Rosa testified that Sammy had an injury to his forehead and she did not recall if the light complexioned people had any injuries. She clarified that the light-complexioned people left in the SUV and the African-American man she referred to in her 911 call was her neighbor, whom she identified from the photograph as Sammy. Rosa recalled telling an investigator that she thought the man was hitting the SUV with a baseball bat, but she testified he had a wrench.

On cross-examination by Ramirez's counsel, Rosa testified that she did not see Sammy hit the woman he was dragging with a wrench and she did not see the people in the SUV with any weapons.

¹¹ Ramirez drove a blue Kia SUV.

During cross-examination by the prosecutor, Rosa testified that Sammy was hitting the SUV, which she again described as white, everywhere with the wrench, and that she heard the sound of glass breaking. She described the scene as chaotic and “very violent,” but she did not see anyone hitting anyone else and she did not see how anyone was injured. The prosecutor showed Rosa the photograph from which she identified Sammy, which does not depict any injury to his forehead, and she again stated that she saw Sammy bleeding from his forehead. She described the African-American woman as having an injured arm, although she did not recall seeing any blood, and she denied the woman she saw had any injury to her head.

On recross-examination, Ramirez’s counsel showed Rosa a photograph depicting an injury to Jeannette’s forehead. Rosa stated she did not recognize the person in the photograph, although she thought, but was not sure, that the injury depicted was in roughly the same location as the person she saw who had a forehead injury. She testified she was sure that the person hitting the car and dragging the woman was the person she saw with the forehead injury. Rosa also identified Ramirez’s blue SUV from photographs as the vehicle she saw being hit, and she stated again that the person hit the SUV all over, including the windshield.

On recross-examination by the prosecutor, Rosa was shown a photograph of Vela, who was bald and had a gash in his forehead above his left eyebrow. Rosa testified that she could not tell what kind of wound the person she saw had, but he was bleeding from his forehead and he had hair.¹²

2. Ededina

Ededina, like Rosa, stated she did not recognize Vela or Ramirez. She testified that when she and Rosa were leaving for the mall, she heard “horrible” yelling and screaming, and saw a big fight. She initially testified she did not see any weapons, but

¹² The photographs of Sammy taken at the scene show he had hair.

then recalled seeing someone hit a vehicle with a large wrench and seeing an African-American man come out of a house with a knife. She also saw an African-American woman with “blows to her arm,” but did not see how they were inflicted. She recalled telling an investigator that she saw the man go into a house, retrieve a knife and get into a fight with a light-skinned man, but she said she did not pay close attention due to the confusion and the arrival of police.

B. Vela

Finally, Vela testified that at the time of the crime, he had recently been released from the California Department of Corrections and was living with a relative. He was not supposed to have any contact with Ramirez, but he called her because he wanted to see their daughter. Ramirez dropped Vela, their daughter and the dog off at the park. After Ramirez and her other four children, whom Vela helped raise and considered to be his, went to church, they joined him at the park for the afternoon. Toward the end of the day, they all squeezed into Ramirez’s SUV. Vela was in the front passenger seat and Ramirez planned to drop him off at his relative’s house.

As Ramirez was driving, she hit the brake suddenly, which scared everyone. Vela then saw the laser beam moving around and hitting them in the face. He could see it was coming from the middle of Townsley Avenue. Ramirez, who was upset, turned down Townsley and honked at the children playing in the street so they would get out of the way. She made a U-turn and stopped in the middle of the street in front of the house identified by address as Jeannette’s.

When they pulled up, Vela saw Sammy put the laser in his pocket and he was confrontational when he approached the SUV. He denied having a laser and started cussing and calling Ramirez names. Vela then got out of the SUV to talk to Sammy and calm him down. When Vela confronted Sammy about having the laser in his pocket, Sammy threatened to whip him, and Sammy hit him in the face. Sammy then backed up to remove his shirt.

Sammy and Vela started swinging at each other as Jeannette egged Sammy on. Vela testified that approximately three times, Sammy stopped, Vela turned to walk back to the SUV, and Sammy then ran up behind him and hit him, connecting with the back of his head several times. As Vela ran toward the SUV, Jeannette was standing in front of it hitting it with a pipe. Jeannette stopped when she saw Vela. Ramirez was out of the SUV by then, along with Angelica, and they were all yelling. As Vela reached the vehicle and opened the door, Sammy ran into the house. Vela told everyone to get back in the SUV, which they did. The dog jumped out, however, and Vela told Noel to get the dog, reasoning that Sammy would not attack a 14-year-old.

Noel was outside the SUV when Sammy came back out of the house. Vela heard Jeannette scream, "Oh my, God. He's got his gun," which Vela perceived as a concerned warning rather than a threat. Ramirez said, "Did you hear he got his gun?" and, "[L]et's go." As Noel tried to grab the dog, Sammy came running up and started swinging at Noel, hitting him several times. As Ramirez was getting out of the SUV, Sammy threatened to shoot them. His hand was behind his back.

Sammy grabbed Ramirez by her hair, pulled her head down and started hitting her as he dragged her approximately 15 feet. Jeannette started hitting Ramirez with the pipe. As Vela got out of the SUV and was walking around it, Noel was screaming at him to help Ramirez. Vela told Noel to grab the dog and stay in the SUV. Vela headed toward Ramirez and Luis came running from across the street with his hands up. Vela chased Luis off and went over to where Ramirez was down on the ground. Vela testified Ramirez and Jeannette were "locked up with their hair." He freed Ramirez as Sammy hit him, and Jeannette then hit him in the head with the pipe above his left eye, causing him to black out momentarily. Vela fell to the ground and he testified he could barely see because of the blood dripping down his face. Sammy and Jeannette, who were both armed with weapons, were hitting him in the back and the head.

Vela testified that he had a boxcutter, or double duck knife, in his pocket for his work in air conditioning installation and repair, and, at that point, he grabbed it out of his pocket and started swinging. He recalled hitting Sammy once and Sammy falling on him, but he said the blow with the knife did not faze Sammy. Sammy and Jeannette continued to hit Vela, and, at some point, Sammy slipped and fell, which tripped Vela up. Vela testified he believed the injuries to Sammy's back may have occurred when Sammy fell and they fought on the ground. Vela also testified Sammy had a wrench and a gun, and he just wanted to survive and get out of there.

Sammy and Jeannette stopped hitting Vela and, as he got up, Luis was kicking him. Luis then ran. Vela denied ever swinging his knife at Luis and, after he got up, he ran to Ramirez's SUV. Vela stated Luis then ran toward their vehicle, but they took off. Vela said he heard something hit the ground and thought Luis might have thrown something.

After Ramirez dropped the dog off at her house, she dropped Vela off at his relative's house because he wanted to get his insurance card before going to the hospital. Vela testified that he had a golf ball size lump on his head under the gash, which was not visible in the photographs taken, and he received stitches. He acknowledged that he stated he fell down playing basketball, he did not tell police he acted in self-defense and he requested a lawyer.

During cross-examination by Ramirez's counsel, Vela testified he did not see the injury to Jeannette's forehead, he did not know who caused the injury, he did not see Ramirez with a weapon and he did not see Ramirez hit Jeannette. He also testified Jeannette did not have the injury to her forehead before he took the knife out of his pocket and he did not get a good look at her after he took the knife out.

During cross-examination by the prosecutor, Vela denied saying or yelling "Eastside Bakers," but stated Sammy said, "Westside." He testified that during the initial confrontation with Sammy, he could smell alcohol on Sammy's breath. He also testified

that when Sammy came out of the house, he had a wrench in his back pocket. After Sammy grabbed Ramirez by her hair, he hit her repeatedly in the face as he was dragging her. Vela estimated Sammy hit Ramirez hard around 20 times while Jeannette hit Ramirez in the back with the pipe around 10 times.

After Vela freed Ramirez, Vela cut Sammy once but Sammy kept swinging with full force. Sammy then swung with the wrench and missed because he slipped on the grass. Vela testified that before Sammy slipped on the grass, he hit Vela a couple of times with the wrench in the shoulder area. Vela did not see Jeannette with a weapon other than the metal pipe and did not see Sammy with a knife or a pipe. Ramirez did not have any weapon and he only had a boxcutter. Vela did not remember hitting Sammy in the head with the boxcutter and said he was swinging it everywhere. He denied he and Ramirez attacked Jeannette together or that he ever hit Jeannette, and he stated that it was Ramirez, not Jeannette, who was curled up in a fetal position. When Sammy fell on the grass, Vela was over him, but Vela denied Jeannette was underneath them. He denied Ramirez ever hit Jeannette with a wrench, as Luis and T. had testified. He also denied blacking out when he was hit. He explained he saw a flash of light when he was hit and he fell to the ground.

He testified that although the officer at the hospital was in uniform, he told her he hurt his head playing basketball because she was working at the hospital and he did not think it was any of her business what happened. He testified his other injuries were not visible in the photographs, as the photos were taken for the purpose of documenting his tattoos.

DISCUSSION

I. Vela's Claims

A. Sufficiency of the Evidence: Aggravated Mayhem

1. Standard of Review

“The Due Process Clause of the Fourteenth Amendment denies States the power to deprive the accused of liberty unless the prosecution proves beyond a reasonable doubt every element of the charged offense” (*Carella v. California* (1989) 491 U.S. 263, 265, citing *In re Winship* (1970) 397 U.S. 358, 364), and the verdict must be supported by substantial evidence (*People v. Zamudio* (2008) 43 Cal.4th 327, 357). On appeal, the relevant inquiry governing a challenge to the sufficiency of the evidence “‘is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.’” (*People v. Nguyen* (2015) 61 Cal.4th 1015, 1055.) “The record must disclose substantial evidence to support the verdict—i.e., evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.” (*People v. Zamudio, supra*, at p. 357.)

“In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence.” (*People v. Zamudio, supra*, 43 Cal.4th at p. 357.) “[I]t is the jury, not the appellate court which must be convinced of the defendant’s guilt” (*People v. Nguyen, supra*, 61 Cal.4th at pp. 1055–1056.) “A reversal for insufficient evidence ‘is unwarranted unless it appears “that upon no hypothesis whatever is there sufficient substantial evidence to support” the jury’s verdict.’” (*People v. Zamudio, supra*, at p. 357.) However, “speculation, supposition and suspicion are patently insufficient to support an inference of fact.” (*People v. Franklin* (2016) 248 Cal.App.4th 938, 951; accord, *People v. Marshall* (1997) 15 Cal.4th 1, 35; *People v. Xiong* (2013) 215 Cal.App.4th 1259, 1268.)

2. Analysis

a. Aggravated Mayhem

The aggravated mayhem statute provides, in relevant part: “A person is guilty of aggravated mayhem when he or she unlawfully, under circumstances manifesting extreme indifference to the physical or psychological well-being of another person, *intentionally causes permanent disability or disfigurement of another human being* or deprives a human being of a limb, organ, or member of his or her body. For purposes of this section, it is not necessary to prove an intent to kill.” (§ 205, italics added.) “[A]ggravated mayhem [is] a specific intent crime,” which requires the prosecutor to prove “beyond a reasonable doubt ‘that the defendant acted with the specific intent to cause a maiming injury.’” (*People v. Manibusan* (2013) 58 Cal.4th 40, 86 (*Manibusan*); accord, *People v. Szadziejewicz* (2008) 161 Cal.App.4th 823, 831 (*Szadziejewicz*).)

b. Parties’ Positions

Vela claims the jury’s findings that he intended to disable or disfigure Sammy and Jeannette are not supported by substantial evidence. He contends “[t]he evidence show[s] ... that the attack was indiscriminate, random, or an explosion of violence.” He points out that he did not wield a knife at the beginning of the fight, there is no evidence the knife “was a specialized knife particularly well-suited for causing lasting wounds,” and Sammy and Jeannette were active participants in the fight. He also points out that “the intent to kill is not the same as the intent to maim.”

The People respond that the location, symmetry and severity of Sammy’s and Jeannette’s injuries support the jury’s finding that Vela had the specific intent to maim them. They contend the evidence shows that at the time they were injured, they did not present any threat to Vela, and, given the locations of their wounds, he was not indiscriminately slashing at them.

c. Sufficient Evidence Supports Convictions

“A jury may not find specific intent ‘solely from evidence that the injury inflicted actually constitutes mayhem; instead, there must be other facts and circumstances which support an inference of intent to maim rather than to attack indiscriminately.’ [Citation.] ‘A jury may infer a defendant’s specific intent from the circumstances attending the act, the manner in which it is done, and the means used, among other factors.’ [Citation.] ‘[E]vidence of a “controlled and directed” attack or an attack of “focused or limited scope” may provide substantial evidence of’ a specific intent to maim.” (*Szadziwicz, supra*, 161 Cal.App.4th at p. 831; accord, *People v. Quintero* (2006) 135 Cal.App.4th 1152, 1162.)

Focusing on the photographic evidence and the testimony of Luis and T., the prosecutor argued that Vela’s specific intent to main Sammy and Jeannette was inferable from the force used, the location of the wounds and his failure to stop slashing them until Luis intervened. We agree that the evidence supports the jury’s finding as to Vela’s specific intent. In this case, the timeworn expression that a picture is worth a thousand words is apt.

Turning first to the attack on Sammy, “[a] defendant may intend both to kill his or her victim and to disable or disfigure that individual if the attempt to kill is unsuccessful.” (*Szadziwicz, supra*, 161 Cal.App.4th at p. 833, quoting *People v. Ferrell* (1990) 218 Cal.App.3d 828, 833–834 (*Ferrell*).) More recently, the California Supreme Court concluded that the same fact that supports an inference of an intent to kill “can [also] support an inference of an intent to cause permanent disability or disfigurement.” (*Manibusan, supra*, 58 Cal.4th at p. 88, citing *Ferrell, supra*, at p. 835.)

As the parties acknowledged in the trial court and on appeal, the jury in this case had to consider the testimony of 12 eyewitnesses and Ramirez’s statement, all of which differed to one extent or another. However, Vela admitted slicing Sammy with a knife and the nature of Sammy’s injuries was compelling evidence. Vela sliced open Sammy’s

back and side from his rear ribcage to his stomach with what Vela described as a double-sided knife. The resulting wounds were long, deep and gaping. Vela also slashed Sammy down the side of the neck, slicing his earlobe in half. As Vela asserts, the fact that Sammy suffered horrific slashing injuries is not, alone, sufficient to prove he had the specific intent to maim Sammy (*Szadziewicz, supra*, 161 Cal.App.4th at p. 831), but a reasonable jury could have concluded from the evidence that, rather than stabbing Sammy randomly, Vela targeted Sammy's neck and torso with long and damaging slicing injuries in order to maim him. As courts have observed, "[i]t takes no special expertise to know that [certain injuries], if not fatal, [are] highly likely to disable permanently." (*Manibusan, supra*, 58 Cal.4th at p. 88, quoting *Ferrell, supra*, 218 Cal.App.3d at p. 835.) While both *Manibusan* and *Ferrell* involved nonlethal gunshots to the head and to the neck, respectively, the principle articulated applies equally to long, deep knife wounds such as those inflicted here.

With respect to Jeannette's injuries, the knife wounds to her arms and hand are consistent with the evidence that she was down on the ground covering her head and face. The location of her wounds, and the testimony that she was curled in a ball protecting her head and face when they were incurred, supports a reasonable inference that Vela was targeting the area of her face and head with his knife. An attack that is limited in scope and targets a vulnerable part of the victim's body supports a reasonable inference that the attack was not indiscriminate. (*Manibusan, supra*, 58 Cal.4th at p. 88; *People v. Park* (2003) 112 Cal.App.4th 61, 69 (*Park*).)

As well, while a jury might have concluded that the slashings were the result of "an explosion of indiscriminate violence" that occurred in the midst of a melee between two couples (*Park, supra*, 112 Cal.App.4th at p. 70), the evidence did not compel that conclusion. To the contrary, although there was no evidence the knife attack was planned at the outset, the evidence showed a history of animosity between the couples. (*Id.* at p. 71.) In addition to the trial testimony relating to toy theft and bullying, Ramirez

described to police an encounter that was tense from the start. She stated, “[W]e really don’t like them because, um, her kids are always stealing my kids[’] toys. They jump in my backyard,” and later, “[W]e already don’t like each other, so they know who we are.” Although Vela denied he was present for the prior confrontation over a skateboard, the jury was not required to credit his testimony on that point and, regardless, he admitted he was aware of the situation involving Jeannette’s children. Vela also chose to pull a knife midway through the fight, and the “deliberate choice of a steel weapon in lieu of ‘fists-de-cuff’ is ... evidence ... he had the specific intent to maim.” (*Ibid.*) From these circumstances, the jury could have reasonably inferred that the brutal attack was motivated by Vela’s desire to maim Sammy and Jeannette with his knife. (*Ibid.*)

Vela’s contrary arguments—that the attack was indiscriminate; he did not have a knife at the outset; it was not a specialized knife suited to causing lasting wounds; the victims were active participants in the fight; the attack was not directed, controlled or aimed at a vulnerable part of the victims’ bodies; and the absence of any evidence that he stopped the attack as soon as he realized that the victims were maimed—rely on viewing the evidence in the light most favorable to him, which is not the standard of review applicable to his claim.¹³ (*Manibusan, supra*, 58 Cal.4th at p. 92; *Szadziejewicz, supra*, 161 Cal.App.4th at p. 832; *Park, supra*, 112 Cal.App.4th at pp. 71–72.) “If the circumstances reasonably justify the trier of fact’s findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with

¹³ In *Park*, the Court of Appeal observed, “It is particularly significant that [the] defendant stopped his attack once he had maimed [the victim’s] face: he had accomplished his objective.” (*Park, supra*, 112 Cal.App.4th at p. 69.) The presence or absence of that fact is not dispositive, however, and Vela does not claim to the contrary. (*Ibid.*; accord, *Szadziejewicz, supra*, 161 Cal.App.4th at p. 831.) Nor do we find the fact that the defendant in *Szadziejewicz* more methodically sliced up his victim’s face, as Vela argues in his reply brief, of assistance. The factual distinctions between the two cases do not render Vela’s convictions invalid for lack of sufficient evidence. The inquiry is “‘whether any reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt.’” (*Manibusan, supra*, 58 Cal.4th at p. 92.)

a contrary finding.” (*People v. Albillar* (2010) 51 Cal.4th 47, 60; accord, *Manibusan, supra*, at p. 92; *Park, supra*, at pp. 71–72.) Here, sufficient evidence supports the jury’s finding that Vela specifically intended to main Sammy and Jeannette and, therefore, we reject Vela’s challenge to his convictions for aggravated mayhem.

B. Simple Mayhem Convictions

Vela was charged with and convicted of two counts of aggravated mayhem (counts 9 & 10) and two counts of simple mayhem (counts 7 & 8). Relying on *People v. Robinson* (2014) 232 Cal.App.4th 69, 79 (*Robinson*), Vela contends that simple mayhem is a necessarily included lesser offense of aggravated mayhem and, therefore, he is entitled to reversal of his simple mayhem convictions. The People agree.

It is well settled that “[a] defendant may be convicted of more than one offense based on the same act or a single course of conduct. [Citations.] However, a defendant may not be convicted of two such offenses if one is a necessarily included lesser offense of the other.” (*Robinson, supra*, 232 Cal.App.4th at p. 73, citing § 954 & *People v. Reed* (2006) 38 Cal.4th 1224, 1227; accord, *People v. Delgado* (2017) 2 Cal.5th 544, 570.)

“[I]f the statutory elements of the greater offense include all of the statutory elements of the lesser offense, such that the greater offense cannot be committed without also committing the lesser offense, the latter is necessarily included in the former.”

(*Robinson, supra*, at p. 74, citing *People v. Reed, supra*, at p. 1230 & *People v. Smith* (2013) 57 Cal.4th 232, 240.) After analyzing sections 203 and 205, the Court of Appeal in *Robinson* concluded that “under the statutory elements test, simple mayhem in violation of section 203 is a necessarily included lesser offense of aggravated mayhem in violation of section 205.” (*Robinson, supra*, at p. 79.)

The People concede that *Robinson* applies here and we accept the concession. Accordingly, Vela’s convictions for simple mayhem (counts 7 & 8) are reversed.

II. Ramirez’s Claims

A. *Miranda* Claim

1. Parties’ Positions

Ramirez’s statement to police was played for the jury during the prosecutor’s case-in-chief. On appeal, Ramirez claims the trial court erred in admitting the statement because the officers interrogating Ramirez failed to clarify whether she was invoking her right to counsel, a reasonable officer would have understood she was invoking her right to remain silent, and she did not adequately understand the *Miranda* advisements. She also argues that given the totality of the circumstances, her statement was not voluntary. Ramirez argues the error was “substantially prejudicial” because this was a close case that turned on witness credibility.

In response, the People argue that whether or not Ramirez’s statement was obtained in violation of *Miranda*, any error was harmless beyond a reasonable doubt. We agree.

2. Legal Standard

“As a prophylactic safeguard to protect a suspect’s Fifth Amendment privilege against self-incrimination, the United States Supreme Court, in *Miranda*, required law enforcement agencies to advise a suspect, before any custodial law enforcement questioning, that ‘he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.’ [Citations.] If the suspect knowingly and intelligently waives these rights, law enforcement may interrogate, but if at any point in the interview he invokes the right to remain silent or the right to counsel, ‘the interrogation must cease.’” (*People v. Martinez* (2010) 47 Cal.4th 911, 947; accord, *People v. Case* (2018) 5 Cal.5th 1, 20 (*Case*); *People v. McCurdy* (2014) 59 Cal.4th 1063, 1085–1086 (*McCurdy*).)

““In reviewing *Miranda* issues on appeal, we accept the trial court’s resolution of disputed facts and inferences as well as its evaluations of credibility if substantially supported, but independently determine from undisputed facts and facts found by the trial court whether the challenged statement was legally obtained.”” (*People v. Martinez, supra*, 47 Cal.4th at p. 949; accord, *Case, supra*, 5 Cal.5th at p. 20.) Where, as here, “an interview is recorded, the facts surrounding the admission or confession are undisputed and we may apply independent review.” (*People v. Duff* (2014) 58 Cal.4th 527, 551 (*Duff*).)

A suspect’s invocation of the right to remain silent or to counsel must be unambiguous. (*Case, supra*, 5 Cal.5th at p. 20, citing *Berghuis v. Thompson* (2010) 560 U.S. 370, 381–382 (*Berghuis*) [right to remain silent]; *McCurdy, supra*, 59 Cal.4th at p. 1087, citing *Davis v. United States* (1994) 512 U.S. 452, 459 (*Davis*) [right to counsel].) That is, the reference to counsel or request to remain silent must be ““sufficiently clear[] that a reasonable police officer in the circumstances would understand”” it as an invocation of that right. (*Case, supra*, at p. 20; accord, *McCurdy, supra*, at p. 1087.)

3. Alleged *Miranda* Violation

a. Initial Questioning

In this case, Ramirez was advised of her rights twice and then mentioned an attorney, as follows:

“MONTGOMERY: ... Do you understand your *Miranda* rights?^[14]

“RAMIREZ: Hmm?

“MONTGOMERY: Do you understand them?

“RAMIREZ: Ah, they’re—yeah.

¹⁴ As there is no dispute over the adequacy of either *Miranda* advisement, we do not repeat the initial advisement here.

“MONTGOMERY: You do?

“RAMIREZ: Yeah, I barely kinda got it.

“MONTGOMERY: Okay. Want me to read ‘em again, or do you understand?

“RAMIREZ: Okay, read again.

“MONTGOMERY: So you have the right to remain silent. Anything you say may be used against you in court.

“RAMIREZ: Mm-hm.

“MONTGOMERY: You have the right to the presence of an attorney before and during any questioning. If you cannot afford an attorney, one will be appointed to you for free of charge before any questioning, if you want.

“RAMIREZ: Okay.

“MONTGOMERY: Do you understand?

“RAMIREZ: Yes.

“MONTGOMERY: Okay. So would you like to start by telling me what happened the other night?

“RAMIREZ: *So I would just rather get a—like if I can’t get an attorney, my mom and dad don’t get me one, I’d rather just—I mean I didn’t do nothing wrong.*

“MONTGOMERY: No, I’m—I’m asking you...

“RAMIREZ: I’m just saying I’d rather...

“MONTGOMERY: ...would—would you—would you like to tell me what happened?

“RAMIREZ: Because I don’t know if I’m gonna—if they’re gonna try and blame me for this. I mean ‘cause look what’s happening right now.

“MONTGOMERY: No. I’m here just to get your side of the story. That’s what I’m here to do. Okay?

“ROSCOE: Yeah. [An] incident happened, and we have some people saying some things. And we just want to get your side of the story, see what you want to say, ah, what—what—what happened, ah, that night. That’s all it is—this is.

“MONTGOMERY: Can we just go over the basics for now? Can you just spell your...

“RAMIREZ: This...

“MONTGOMERY: ...first name for me?

“RAMIREZ: Yeah, Gloria Ramirez. But you said it—what I say could be used against m[e].

“MONTGOMERY: You said Gloria—spell your last name.”
(Italics added.)

Officer Montgomery then proceeded to obtain personal background information from Ramirez before changing the subject to Vela.

“MONTGOMERY: ... What’s your boyfriend’s name?

“RAMIREZ: ... Um, I don’t have a boyfriend. This is...

“MONTGOMERY: Or the male subject you’re involved with in the fight.

“RAMIREZ: *Sir, I would just rather not say nothing until I get a—well ‘cause, ah, this looks like I’m gonna be in the wrong here. And I didn’t do anything.*

“MONTGOMERY: No. You have every right to explain to me your side of the story. Okay? And that’s what I’m giving you the chance to do right now.

“RAMIREZ: But then what I say can be used against me you said and the whole thing.

“MONTGOMERY: Yeah, I did say that.

“RAMIREZ: So I just—I mean...

“MONTGOMERY: It, ah, I’m...

“RAMIREZ: Well I’ll say...

“MONTGOMERY: ...I’m tell[ing] you, if—if I don’t hear...

“RAMIREZ: I’ll say this—well ‘cause I mean I don’t got nothing to hide. This is the truth.

“MONTGOMERY: No. If I don’t hear a side of the story from you, I just have to go off what other people told me. Does that make sense?

“RAMIREZ: Mm-hm.

“MONTGOMERY: And then you don’t have your chance to say what happened. I just have to go [off] what other people said...

“RAMIREZ: Mm-hm.

“MONTGOMERY: ...and then based on what they tell me I make a decision just on what they say, not when you told me.

“RAMIREZ: Mm-hm.

“MONTGOMERY: So I’m giving you the chance to tell me what happened that night.” (*Italics added.*)

Ramirez then proceeded to give a statement.

b. Clarification Rule

On appeal, Ramirez argues that, even if her requests were ambiguous, given the interrogation stage, officers were required to clarify whether she was invoking her right to counsel and to remain silent. The People do not address this point and focus their argument on the lack of prejudice from the admission of the statement.

In support of her argument, Ramirez relies on *Duff, supra*, 58 Cal.4th at pages 553–554 and *United States v. Rodriguez* (2008) 518 F.3d 1072, 1080 (*Rodriguez*).¹⁵ We are not persuaded the issue is as settled as Ramirez’s argument suggests, however.

¹⁵ Ramirez also cites to *People v. Box* (2000) 23 Cal.4th 1153, 1194 and *People v. Johnson* (1993) 6 Cal.4th 1, 27. As relevant to our discussion, the decision in *People v. Johnson* preceded the United States Supreme Court’s decision in *Davis*, and *People v. Box* was disapproved by *People v. Martinez, supra*, 47 Cal.4th at page 948, footnote 10, on the point relied on by Ramirez. Therefore, we do not further address those decisions.

In *Rodriguez*, the suspect responded to the officer's *Miranda* advisement by stating, "'I'm good for tonight.'" (*Rodriguez, supra*, 518 F.3d at p. 1075.) Relying on *Davis*, the magistrate judge concluded that because the statement was not an unambiguous invocation of the right to remain silent, officers were not required to cease questioning the suspect. The Ninth Circuit agreed the statement was ambiguous but applied the "broad 'clarification' rule" and held that, except where a suspect has unequivocally and unambiguously waived his *Miranda* rights, law enforcement officers are required to clarify ambiguous statements before continuing an interrogation. (*Rodriguez, supra*, at pp. 1077–1078.) As *Davis* involved an ambiguous invocation of rights that occurred well after the suspect waived his rights, the *Rodriguez* court distinguished the *Davis* decision on that ground.

However, we are not bound by federal appellate court decisions (*People v. Brooks* (2017) 3 Cal.5th 1, 90–91), and Ramirez's citation to *Duff* is not dispositive of the matter, either. In *Duff*, in circumstances analogous to those here, the defendant stated he understood his rights and, in response to being asked whether he wished to speak to the detective, said, "'I don't know. Sometimes they say it's—it's better if I have a—a lawyer.'" (*Duff, supra*, 58 Cal.4th at p. 552.) Citing to *People v. Williams* (2010) 49 Cal.4th 405, 427 and *Rodriguez, supra*, 518 F.3d at page 1078, the California Supreme Court stated, "We agree with *Duff* that because his reference to a lawyer occurred at the beginning of questioning, the rules respecting pre-*Miranda* waiver invocations of the right to counsel apply. [Citations.] Thus, the postwaiver rule rejecting any duty to clarify ambiguous invocations and permitting an officer to continue substantive questioning "'until and unless the suspect *clearly* requests an attorney,'" upon which the People principally rely, is inapposite here.

"In the face of an initial equivocal reference to counsel, we have held that an officer is *permitted* to clarify the suspect's intentions and desire to waive his or her *Miranda* rights. [Citation.] The Ninth Circuit has explicitly declared that an officer not

only may, but *must*, clarify the suspect's intentions before initiating substantive questioning. [Citations.] *We have occasionally implied the same rule as the Ninth Circuit's.* [Citations.] [¶] Even so, no *Miranda* violation occurred here.” (*Duff, supra*, 58 Cal.4th at pp. 553–554, fn. omitted, italics added.)

Thus, the court did not decide in *Duff* whether the clarification rule applies and requires, rather than merely permits, officers to seek clarification of ambiguous responses.¹⁶ Subsequent California Supreme Court decisions have not cited to *Rodriguez*. In a more recent decision that is also analogous to this case and to *Duff* in that one of the defendant's ambiguous statements regarding counsel directly followed the suspect's acknowledgment of the *Miranda* advisement, the California Supreme Court stated, “A suspect's invocation of the right to counsel must be unambiguous. [Citation.] The reference to an attorney must be sufficiently clear that a reasonable officer under the circumstances would understand the statement was a request for an attorney. [Citation.] A reasonable officer in these circumstances could have concluded that [the] defendant was expressing the abstract idea an attorney might be in his best interest, but he did not actually request one. *Although officers may seek clarification of an ambiguous request, they are not required to do so.*”¹⁷ (*McCurdy, supra*, 59 Cal.4th at p. 1087, citing *Davis, supra*, 512 U.S. at p. 459 & *People v. Williams, supra*, 49 Cal.4th at p. 427, italics added.)

¹⁶ We observe that in *Duff*, the California Supreme court acknowledged that in *Berghuis, supra*, 560 U.S. at page 387, a post-*Rodriguez* decision, the United States Supreme Court rejected “the argument that a clear waiver must always precede questioning because ‘[t]he *Miranda* rule and its requirements are met if a suspect receives adequate *Miranda* warnings, understands them, and has an opportunity to invoke the rights before giving any answers or admissions.’” (*Duff, supra*, 58 Cal.4th at pp. 553–554.)

¹⁷ In *McCurdy*, after the detective advised the defendant of his rights under *Miranda* and asked if he wanted to help them with the investigation, the defendant said, “‘They always tell you to get a lawyer.... I don’t know why.’” (*McCurdy, supra*, 59 Cal.4th at p. 1081.)

We need not decide, however, whether Ramirez waived her rights and, if not, whether officers were required to seek clarification of her ambiguous responses, as she argues. We agree with the People that even if we assume Ramirez’s statement was obtained in violation of *Miranda* and the trial court erred in admitting it, the error was harmless beyond a reasonable doubt.¹⁸

4. Any Error Harmless

The standard of review applicable to federal constitutional errors is set forth in *Chapman, supra*, 386 U.S. 18. (*Arizona v. Fulminante* (1991) 499 U.S. 279, 309–312 (*Fulminante*); *People v. Elizalde* (2015) 61 Cal.4th 523, 542; *People v. Cahill* (1993) 5 Cal.4th 478, 510.) Under *Chapman*, we “must determine whether it is clear beyond a reasonable doubt that a rational jury would have rendered the same verdict absent the error.” (*People v. Merritt* (2017) 2 Cal.5th 819, 831, citing *Neder v. United States* (1999) 527 U.S. 1, 18; accord, *People v. Gonzalez* (2012) 54 Cal.4th 643, 663.) “‘To say that an error did not contribute to the ensuing verdict is ... to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record.’ [Citation.] Thus, the focus is what the jury actually decided and whether the error might have tainted its decision.” (*People v. Neal* (2003) 31 Cal.4th 63, 86; accord, *People v. Leon* (2016) 243 Cal.App.4th 1003, 1020.) We consider “not only the evidence that would support the judgment, but also the impact of the inadmissible evidence on the final outcome.” (*People v. Gonzalez* (2012) 210 Cal.App.4th 875, 884.)

The act underlying Ramirez’s conviction for assault with a deadly weapon was hitting Jeannette in the face with the wrench. The prosecution’s evidence supporting that count was the testimony of Luis and T., both of whom saw Ramirez hit Jeannette with the wrench, and Jeannette’s facial injury, which was consistent with being hit with a wrench.

¹⁸ Our determination that any error was harmless also renders moot Ramirez’s remaining argument that her statement was not voluntary under the totality of the circumstances.

As well, Jeannette testified she felt like someone punched her while she was curled up on the ground, which is consistent with Luis and T.'s testimony as to when Ramirez hit Jeannette with the wrench.

The act underlying Ramirez's conviction for simple assault was aiding and abetting Vela's knife attack on Jeannette. There was photographic evidence of the slashing injuries to Jeannette, and T. testified that Ramirez and Vela both appeared to be hitting Jeannette as she was curled up on the ground. T. testified that thereafter, Luis threw Ramirez off Jeannette and Ramirez grabbed a wrench, hit Jeannette with it, and returned to her vehicle.

We are not confronted here with the admission of a damaging confession. (See *Fulminante, supra*, 499 U.S. at p. 296 ["A confession is like no other evidence. Indeed, 'the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him....'"]; *People v. Saldana* (2018) 19 Cal.App.5th 432, 463 [in child molestation case, admission of confession prejudicial where "(1) there were no independent witnesses, (2) the alleged victims may fairly be described as less than reliable, and (3) there was credible expert testimony favoring [the defendant].".]) Ramirez did not admit to hitting Jeannette with a wrench or helping Vela as he sliced Jeannette. To the contrary, she specifically denied hitting Jeannette with a wrench, denied she or Vela had any weapons and characterized the altercation as "just a fight" that was started by Sammy and Jeannette, who were armed with a wrench and a crowbar. Ramirez concedes as much, but she claims that the admission of her statement was nevertheless prejudicial because "the case against [her] was a close one that turned on credibility," and the prosecutor relied on her statement to challenge her truthfulness. She contends that because the jury convicted her of assault with a deadly weapon, her statement "to the police must be viewed as substantially prejudicial."

We do not agree with Ramirez's assessment of her statement's impact on the jury. Although the jury heard Ramirez's statement and the prosecutor used it to bolster his

argument to the jury, Ramirez did not testify at trial and, therefore, she was not impeached with her statement. (See *Case, supra*, 5 Cal.5th at p. 23 [“[W]hile a jury certainly might have regarded [the] defendant’s [explanation] ... as absurd, which would have affected his credibility, [the] defendant’s credibility was not at issue as he did not testify.”].) Moreover, there was no dispute that a physical altercation between Vela, Ramirez, Sammy and Jeannette occurred, or that Sammy and Jeannette were slashed by Vela with a knife, resulting in serious injuries to them. Vela’s and Ramirez’s injuries were, in contrast, very minor. As we previously recognized, the evidence of the victims’ injuries was compelling and was consistent with the prosecution’s version of events. Further, Luis and T., who were in the best position to view the fight and were less connected to the crime emotionally by virtue of being neighbors rather than family members, offered a credible explanation for how Sammy’s and Jeannette’s injuries were inflicted.

We are unpersuaded that the admission of Ramirez’s statement had any direct bearing on the jury’s evaluation of the photographic evidence and Luis and T.’s testimony. In her reply brief, Ramirez points to the prosecutor’s statement to the jury that it was a “tougher call on the charges as an aider and abettor. The evidence is not as clear on those charges.” That statement, however, was made in the context of arguing that Ramirez was guilty of aggravated mayhem and simple mayhem, of which she was acquitted.

The evidence of Ramirez’s version of events vis-à-vis her statement to police was also, in material part, cumulative of the version of events told by Vela, Angelica and Noel at trial. Vela described a fight in which Sammy and Jeannette, armed with weapons, repeatedly hit him and Ramirez. Angelica and Noel, too, testified that Sammy and Jeannette repeatedly hit Vela and Ramirez with their weapons, and Noel testified that Jeannette’s children were armed with weapons and repeatedly hit Vela and Ramirez. Ramirez’s statement had limited probative value given that she admitted only to

participating in a fistfight, but to the extent her description of events mismatched the physical evidence so much so that she suffered some harm in the eyes of the jurors, as her argument suggests, any minimal harm was even further reduced by the existence of cumulative defense evidence. (*Case, supra*, 5 Cal.5th at p. 23.)

For these reasons, the admission of Ramirez’s statement to police was harmless beyond a reasonable doubt. That is, even assuming error, under these circumstances, “it is clear beyond a reasonable doubt that a rational jury would have rendered the same verdict absent the error.” (*People v. Merritt, supra*, 2 Cal.5th at p. 831; accord, *Case, supra*, 5 Cal.5th at p. 23.)

B. Sentencing Error

Ramirez claims the trial court was unaware of the scope of its discretion to strike, or impose and stay, the GBI enhancement and therefore erred in failing to exercise informed discretion. (§ 12022.7.) The People agree.

“‘Defendants are entitled to sentencing decisions made in the exercise of the “informed discretion” of the sentencing court. [Citations.] A court which is unaware of the scope of its discretionary powers can no more exercise that “informed discretion” than one whose sentence is or may have been based on misinformation regarding a material aspect of a defendant’s record.’ [Citation.] In such circumstances, we have held that the appropriate remedy is to remand for resentencing unless the record ‘clearly indicate[s]’ that the trial court would have reached the same conclusion ‘even if it had been aware that it had such discretion.’” (*People v. Gutierrez* (2014) 58 Cal.4th 1354, 1391.)

“‘[S]ection 1385[, subdivision](a) ... gives trial courts discretion ‘in furtherance of justice [to] order an action to be dismissed.’” (*People v. Fuentes* (2016) 1 Cal.5th 218, 224.) “A trial court’s discretion to dismiss an ‘action’ under section 1385[, subdivision](a) encompasses the power to strike or dismiss a sentencing enhancement allegation.

[Citations.] Further, subdivision (c)(1)¹⁹ of section 1385 ... expressly provides that a trial court may ‘instead strike the additional punishment’ for an enhancement that it may otherwise dismiss or strike under subdivision (a).” (*Id.* at p 225.) Although it need not be express, “there must be ““a clear legislative direction”” eliminating the trial court’s section 1385 authority” (*id.* at p. 226), and “[g]eneral mandatory language, such as “shall” ... is insufficient to support a finding of Legislative intent to divest trial courts of discretion under ... section 1385 to strike enhancements”” (*People v. Meloney* (2003) 30 Cal.4th 1145, 1155, fn. omitted, quoting *People v. Wilson* (2002) 95 Cal.App.4th 198, 202).

In this case, the record expressly supports Ramirez’s claim that the trial court believed that it lacked discretion to stay the sentence for the GBI enhancement, a position with which the prosecutor and probation officer agreed. Moreover, as the People concede, nothing in the language of section 12022.7, subdivision (a), suggests the trial court’s authority to strike the enhancement, or impose but stay punishment under section 1385 has been eliminated.²⁰ Nor is this a circumstance where remand “would serve no purpose but to squander judicial resources” because “there appears no possibility that, if the case were remanded, the trial court would exercise its discretion to strike the enhancement altogether.” (*People v. McVey* (2018) 24 Cal.App.5th 405, 419; accord, *People v. Gutierrez* (1996) 48 Cal.App.4th 1894, 1896.) Therefore, we find the People’s concession as to the error well founded and remand the matter for the court to exercise its

¹⁹ Effective January 1, 2019, section 1385 was amended to delete former subdivision (b), and former subdivision (c) was renumbered to subdivision (b). (Sen. Bill No. 1393, ch. 1013, § 2.)

²⁰ Section 12022.7, subdivision (a) provides: “Any person who personally inflicts great bodily injury on any person other than an accomplice in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment in the state prison for three years.” As we have stated and as the People acknowledge, use of the word “shall” in this context is insufficient to support a finding that the Legislature intended to limit the trial court’s authority under section 1385. (*People v. Meloney, supra*, 30 Cal.4th at p. 1155.)

discretion and, if appropriate, following exercise of that discretion, to resentence Ramirez. This determination renders Ramirez's derivative ineffective assistance of counsel claim moot.

C. Convictions for Simple Assault

Finally, Ramirez was acquitted of simple mayhem against Jeannette H. (count 8) and of aggravated mayhem against Jeannette H. (count 10), but as to both counts, she was convicted of simple assault. (§ 240). We directed Ramirez and the People to brief whether Ramirez may be properly convicted of both counts of simple assault. (Gov. Code, § 68081.) The People concede that Ramirez may not be convicted of both counts of simple assault arising out of the same act against the same victim. (§ 954; *People v. Vidana* (2016) 1 Cal.5th 632, 651.) We accept the concession.

Section 954 provides: "An accusatory pleading may charge two or more different offenses connected together in their commission, or different statements of the same offense or two or more different offenses of the same class of crimes or offenses, under separate counts, and if two or more accusatory pleadings are filed in such cases in the same court, the court may order them to be consolidated. The prosecution is not required to elect between the different offenses or counts set forth in the accusatory pleading, but the defendant may be convicted of any number of the offenses charged, and each offense of which the defendant is convicted must be stated in the verdict or the finding of the court; provided, that the court in which a case is triable, in the interests of justice and for good cause shown, may in its discretion order that the different offenses or counts set forth in the accusatory pleading be tried separately or divided into two or more groups and each of said groups tried separately. An acquittal of one or more counts shall not be deemed an acquittal of any other count."

Thus, the prosecutor was permitted to charge Ramirez with both simple mayhem and aggravated mayhem against Jeannette, but, as discussed in Part I.B. with respect to Vela, Ramirez could not have stood properly convicted of both offenses. In this instance,

as to simple mayhem (count 8) and aggravated mayhem (count 10), the jury convicted Ramirez of simple assault. Given that both offenses are based on the same underlying act committed against the same victim, Ramirez may not stand convicted on both counts. (§ 954; see *People v. Vidana*, *supra*, 1 Cal.5th at p. 650 [““The most reasonable construction of the language in section 954 is that the statute authorizes multiple convictions for different or distinct offenses, but does not permit multiple convictions for a different statement of the same offense when it is based on the same act or course of conduct.””]; see also *People v. Brunton* (2018) 23 Cal.App.5th 1097, 1099–1100 [the defendant could only be convicted of one count of assault where the separate counts alleged were based on different subdivisions within § 245, subd. (a), and asserted a single offense arising from same conduct]; *People v. Coyle* (2009) 178 Cal.App.4th 209, 217 [three convictions for the murder of one person, alleged under different theories, were improper under § 954].) Viewing aggravated mayhem (count 10) as the greater offense, Ramirez agrees that reversal of count 8 is appropriate. We concur.

DISPOSITION

Vela’s convictions for simple mayhem (counts 7 & 8) and Ramirez’s conviction for simple assault (count 8) are reversed, their related sentences are vacated, and the trial court is directed to issue amended abstracts of judgment reflecting this order and to send copies of the amended abstracts of judgment to the appropriate agencies. In addition, as to Ramirez, the matter is remanded to the trial court to exercise its discretion under Penal Code sections 12022.7 and 1385 and, if appropriate, following exercise of that discretion,

to resentence Ramirez accordingly. Vela's and Ramirez's judgments are otherwise affirmed.

MEEHAN, J.

WE CONCUR:

HILL, P.J.

POOCHIGIAN, J.